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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/721,871	11/24/2000	Kenneth B. Higgins	5113	4059

7590 04/14/2005  
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EXAMINER

JUSKA, CHERYL ANN

ART UNIT PAPER NUMBER

1771

DATE MAILED: 04/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/721,871

Applicant(s)

HIGGINS ET AL.

Examiner

Cheryl Juska

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 07 February 2005.  
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 57-85 and 150 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 57-85 and 150 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.  
5) ☐ Notice of Informal Patent Application (PTO-152)  
6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Response to Amendment***

1. Applicant's amendment filed February 7, 2005, has been entered. Claim 65 has been amended as requested. Claims 1-56 and 86-149 are cancelled. Thus, the pending claims are 57-85 and 150.

### ***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 57-60, 62-67, 69-73, and 75-80 are rejected under 35 USC 103(a) as being unpatentable over US 4,552,857 issued to Higgins in view of US 5,610,207 issued to DeSimone et al. and in further view of US 5,540,968 issued to Higgins.

Applicant's argument that Higgins '857 and DeSimone do not teach the claimed invention with respect to the second layer of adhesive of the bridging composite is not in contacting relation with the upper side of the rebond bond foam cushion is found persuasive (Amendment, page 13, 2<sup>nd</sup> paragraph). As such, the reference of Higgins '968 is added to the rejection.

Higgins '857 exemplifies a carrier layer between the adhesive layer and the foam backing layer. However, it is well known in the art that said carrier layer can be omitted so that the adhesive layer is in contacting bonding relation to the foam backing. For example, Higgins '968 teaches a similar carpet structure wherein a reinforcement layer (i.e., carrier layer) is between the

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adhesive layer and the foam layer (Figure 3A and col. 6, lines 8-12). Higgins '968 also teaches an equivalent structure wherein said reinforcement layer is omitted and said adhesive layer directly contacts the foam layer (col. 6, lines 44-54 and Figure 4A). Thus, it would have been obvious to one skilled in the art to omit the carrier layer of Higgins '857, as is taught by Higgins '968, when bonding the rebond foam layer of de Simone to the Higgins '857 carpet tile.

Motivation to do so would be to eliminate a process step and the required apparatus unnecessary and to eliminate a layer, wherein the overall thickness of the carpet tile is reduced. Therefore, claims 57-60, 62-67, 69-73, and 75-80 are rejected as being obvious over the cited prior art.

With respect to the amendment to claim 65, wherein the density range is narrowed to the range of about 6-12 lb/ft<sup>3</sup>, it is argued that this range has been addressed in the rejection of claim 66, wherein the density is limited to about 8-10 lb/ft<sup>3</sup>. As such, claim 65 stands rejected.

4. Claims 81-85 and 150 stand rejected under 35 USC 103(a) as being unpatentable over the cited Higgins and DeSimone patents as set forth above, and in further view of US 5,540,968 issued to Higgins for the reasons of record.

5. Claims 61, 68, and 74 are rejected under 35 USC 103(a) as being unpatentable over both of the cited Higgins patents and the DeSimone patent as set forth above, and in further view of US 5,616,200 issued to Hamilton for the reasons of record.

### ***Response to Arguments***

6. Applicant's arguments submitted with the amendment and the Norton Declaration filed on February 7, 2005, have been considered but are found to be unpersuasive. Specifically, applicant traverses the above rejections by noting the examiner previously agreed that the

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accepted wisdom in the art was that rebond foam would not be suited for carpet tiles (Amendment, page 12, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs). As such, applicant disagrees that unexpected results are required to establish nonobviousness (Amendment, page 12, 1<sup>st</sup> paragraph).

In response, it is first noted that the Norton Declaration does not present any quantitative data showing unexpected results, but merely reiterates that the accepted wisdom in the art was that rebond foam was not suited for carpet tiles. Secondly, the examiner respectfully disagrees that the previous Kilpatrick Declarations and/or said Norton Declaration is sufficient to show nonobviousness. Indeed, MPEP 2145 states that proceeding contrary to accepted wisdom in the art is evidence of nonobviousness. In particular, *In re Hedges*, 228 USPQ 685 held that the “PTO acted erroneously in determining that claimed process for sulfonating diphenol sulfone at its molten state would be obvious from prior art, *since* references all suggest that lower temperatures are preferable, and *none suggests that reaction may be advantageously produced at molten state*, and *since data produced by inventor*, and not challenged by PTO, *show significant advantages of claimed invention*, so that, on balance, inventor proceeded contrary to accepted wisdom, which is strong evidence of unobviousness.” [Emphasis added.] Additionally, *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 220 USPQ 303, states “On the entire record and in view of all the references, each in its entirety, it is clear that a person of ordinary skill confronted with a PTFE tape breakage problem would have either slowed the rate of stretching or increased the temperature to decrease the crystallinity. Dr. Gore did neither. He proceeded contrary to the accepted wisdom of the prior art by dramatically increasing the rate and length of stretch *and* retaining crystallinity. That fact is strong evidence of nonobviousness.”

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The differences between the *Hedges* and *Gore* situations and the present invention are (1) the present prior art of record (i.e., DeSimone) explicitly teaches rebond foam employed as a carpet backing and (2) both the *Hedges* and *Gore* cases showed advantageous results were achieved when proceeding contrary to the accepted wisdom. Proceeding contrary to the accepted wisdom in the art is not sufficient to show nonobviousness—especially when the prior art has an explicit teaching thereto. However, the successful results achieved *are what is contrary* to the accepted wisdom. One skilled in the art would expect rebond foam to produce a commercially unsuccessful carpet tile due to the lack of uniformity in thickness and density. This is the accepted wisdom in the art. But, *proceeding contrary* to the accepted wisdom *to achieve advantageous or unexpected results* is evidence of nonobviousness. Thus, applicant is requested to provide sufficient evidence of said advantageous results as described in the last Office Action.

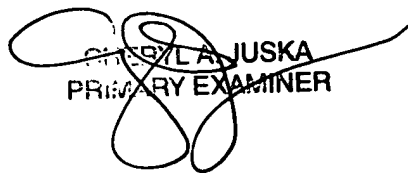
Also note that the examiner is not necessarily requesting applicant conduct a new series of comparative performance tests (Amendment, page 12, 1<sup>st</sup> paragraph), but rather is merely asking for clarification of data presented in specifications of related applications. For example, application 09/910,085 states Standard Milliken ComfortPlus<sup>®</sup> cushion-backed carpet tile has a Gmax test value of 116, while a rebond cushion backed carpet tile of the present invention has a Gmax value of 121 (application 09/910,085, page 88). However, the exact constructions of both carpet samples with respect to materials, weights, thicknesses, densities, etc. are not given. Hence, it is not clear if the unexpected equivalent performances are due to the rebond foam layer and not any other factor (e.g., reinforcing layer, hot melt adhesive, foam density, etc.) alone or in combination with the rebond foam.

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*Conclusion*

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

8. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CHERYL A. JUSKA  
PRIMARY EXAMINER

cj  
April 12, 2005